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In the Supreme Court of the United States

OCTOBER TERM, 1975

OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, AFL-CIO, ET AL., PETITIONERS

v.

MOBIL OIL CORPORATION, MARINE TRANSPORTATION DEPARTMENT, GULF-EAST COAST OPERATIONS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This memorandum is filed in response to the Court's invitation of May 27, 1975.[1]

[1] The questions presented are (Pet. 2):

1. Whether under Section 14(b) of the Taft-Hartley Act and the Texas "Right to Work" laws a union security provision in the form of an agency shop clause may apply to seamen who work exclusively aboard oceangoing vessels which move between Texas and non-Texas ports.

2. Whether the courts below should have withheld declaratory judgment in favor of referral to the National Labor Relations Board for the initial decision in accommodating Sections 14(b), 8(a)(3) and the Texas "Right to Work" laws.

STATEMENT

Mobil Oil Corporation is a New York corporation and its top corporate offices are in New York (App. 171).[2] The Gulf-East Coast Operations division of Mobil's Marine Transportation Department has its offices in Beaumont, Texas; it operates eight ocean-going American flag tankers (App. 57–58). The tankers, which transport petroleum products, typically move from Texas to Atlantic coast ports, making two round trips per month. On any one voyage a ship is at sea for approximately four days and spends approximately 18 hours in port, loading or unloading (App. 153–156). Some of the tankers also move in foreign commerce on voyages lasting as long as six months (App. 157–158).

The 289 unlicensed seamen who work on the tankers are represented for collective bargaining purposes by Maritime Local 8–801 of the Oil, Chemical and Atomic Workers International Union (Pet. App. 1d, 2d). Sixty percent of the seamen seek employment at Mobil's Texas office and 40 percent seek employment at its New York office (App. 90).[3] Some of the seamen ship out of Atlantic ports, while others ship out of Gulf ports.[4] Personnel and payroll records are

[2] "App." refers to the appendix to the briefs in the court of appeals.

[3] 123 employees list Texas as their residence, 60 New York, 21 New Jersey, 16 Florida, 13 Louisiana, 10 Maine, and 10 Rhode Island; the listed residences of the remainder are scattered in 16 other States (App. 71).

[4] The seamen designate home ports for purposes of computing transportation reimbursement for traveling between the port where they board or leave the ship and their residences. The home port is not necessarily the port where they actually board or leave the ship. 152 designate Beaumont as home port; 107 New York City, and 30 Providence, Rhode Island (App. 69, 71, 167–168; Pet. App. 3d).

maintained by the Beaumont office (App. 73). Union dues checkoffs from those employees who have authorized them are made in Beaumont and mailed to the Union in New York (App. 223). Texas administers unemployment compensation on behalf of all the seamen (App. 117). Seamen's claims for maintenance and cure, health, accident and other such benefits are handled in New York (App. 79).

The seamen perform all of their work aboard ship; they work for 85 days and then have 37 days of paid shore leave (App. 247, 256). The seamen are paid, in cash, on board the ship; they are paid every other trip, usually in a northern port (App. 73, 77, 165).[5] The first four steps of the contract grievance procedure take place on board ship. The next step takes place in Beaumont; arbitration, should it be necessary, takes place in New York (App. 183–185).

In 1969, Mobil and the Union negotiated in New York a collective bargaining agreement covering the seamen who work on Mobil's tankers (Pet. App. 2d). The agreement contained an agency shop clause, which required all employees to become "members of the union and/or in the alternative pay the regular union dues and initiation fees within 31 days from the employment date" (Pet. 6).

[5] However, a seaman can request that a check be sent to his bank or his wife. In such event, the master will send a request to the Company's payroll office in Dallas (App. 73–74).

Mobil brought this suit under Section 301 of the Labor Management Relations Act, 61 Stat. 156, 29 U.S.C. 185, seeking a declaratory judgment that the agency shop clause violated the Texas right to work laws (Pet. App. 2c). The district court, finding that the seamen's Texas contacts outweighed those with any other State, held that the Texas right to work laws applied to the agreement and that the agency shop clause was consequently invalid (Pet. App. D).

A divided panel of the court of appeals reversed (Pet. App. B). Drawing on *Western Electric Co., Inc.*, 84 NLRB 1019, and *Northland Greyhound Lines, Inc.*, 80 NLRB 288, the panel held that "the situs of the work performance of the covered employees" (Pet. App. 9b, 11b) was more important than the seamen's contacts with either New York or Texas, so that the "employees involved here are not for the purpose of their collective bargaining agreement employees of Texas or any other State—they are mobile, maritime employees, whose principal place of employment, or jobsite, is on the high seas" (Pet App. 12b–13b.)

The Fifth Circuit sitting *en banc* vacated the panel's judgment and, over six dissents, affirmed the judgment of the district court (Pet. App. 1a–36a). It held that "the federal labor legislation, the predominance of Texas contacts over any other jurisdiction, and the significant interest which Texas has in applying its right to work law to this employment relationship warrant application of the Texas law and, consequently, invalidation of the agency shop provision" (Pet. App. 7a–8a). It rejected the panel's job

situs approach because (Pet. App. 12a–13a) "if the congressional discussion on compulsory unionism could be said to have any single reference point, it is not job situs but the hiring process. And in our judgment, the language of section 14(b) which looks to the 'execution or application' of agreements requiring membership as a condition of employment refutes the notion that Congress was suddenly singularly concerned with the job situs of the employee rather than with the effect of such an agreement on men and women seeking employment in a mobile society."

The six dissenters adhered to the panel's view that maritime employment, "traditionally one in admiralty, regulated in virtually all aspects by federal maritime law, involving seamen who are wards of admiralty," should not be governed by state labor laws "when none of the employees work in the state" (Pet. App. 31a). Chief Judge Brown, in a dissent joined only by Judge Dyer, also argued (Pet. App. 34a) that "it would be better administration and more consistent with sound legal principles for the Court to refer this case to the NLRB under the doctrine of primary jurisdiction."

DISCUSSION

1. The first proviso to Section 8(a)(3) of the National Labor Relations Act, as amended (61 Stat. 140, 65 Stat. 601, 73 Stat. 525, 29 U.S.C.(a)(3)) (NLRB), makes lawful under that Act union security agreements that require union membership commencing 30 days after inception of employment. However, Section 14(b) of the Act, with obvious reference to

Section 8(a)(3), declares that "Nothing in this Act" authorizes 'the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law." Section 14(b) thus permits a State, if it desires, to enact a more comprehensive ban on union security arrangements than does the proviso to section 8(a)(3), which bars only the closed shop. This Court has held that agency shop provisions, which are privileged under Section 8(a)(3) (*National Labor Relations Board* v. *General Motors Corp.*, 373 U.S. 734), are "within the scope of § 14(b) * * * and therefore * * * subject to prohibition by * * * [state] law" (*Retail Clerks* v. *Schermerhorn*, 373 U.S. 746, 747). According to an opinion of its Attorney General (Br. in Opp. A1–A8), the right to work laws of Texas prohibit the agency shop.

The court of appeals has held that the right to work laws of Texas apply to a collective bargaining agreement negotiated in New York and governing the relationship between a New York corporation and a group of workers who perform almost all of their work outside the boundaries of any State. It reached this conclusion because it thought that the majority of the workers had more extensive "contacts" with Texas than with New York or any other State. If the case were, in fact, controlled by a weighing of "contacts," there would be no occasion for review by this Court. The National Labor Relations Board submits, however, that neither Texas law, nor New York law, nor the law of any other State applies to the collective bargaining agreements of those whose jobs are performed beyond State borders.

Whether the union security laws of *any* State apply to such workers is, we submit, an important question warranting resolution by this Court. We have been informed by the Bureau of Labor Statistics that there are approximately 50,000 blue water seamen who may be affected by this decision; all of them, whether engaged in long-term or single voyage employment, have a job situs outside of any State.*

We acknowledge that this case appears to be one of first impression in federal courts. The Board's decisions touching on the question presented here have not been subjected to judicial scrutiny, and there is no conflict among the circuits. Nevertheless, because approximately half of the States with right to work laws are within the Fifth Circuit, the prospects for a conflict to develop are diminished and the importance of the instant decision enhanced. What is more, the decision below is at odds with a policy the Board (and many unions and employers) had regarded as settled. If allowed to stand, it would inject substantial confusion into the dealings between unions and employers, for neither would be able to predict with any accuracy which state law, if any, would be applicable and whether employers would be obliged to honor union security clauses to which they had agreed.

* 21,000 of these seamen are officers and pilots; some of these are supervisors with whom collective bargaining is not required by federal statute.

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2. The court of appeals thought that the laws of *some* State must apply, and held that Texas was that State. We submit that Section 14(b) does not permit application of state union security laws to those who perform their work outside its borders.

The Board was first faced with the problem of the extra-territorial application of right to work laws shortly after the Taft-Hartley amendments to the NLRA, when it was required, by Section 9(e)(1) of the Act,[7] to conduct union shop authorization elections. *Northland Greyhound Lines,* 80 NLRB 288, considered the applicability of state union security laws to interstate bus drivers, and concluded (*id.* at 291):

> In resolving the question as to the applicable State law, such factors as the residences of the employees, the places where they were hired, their headquarters, the proportions of working time spent in the various States, and (with regard to the drivers), their routes, have been given consideration. In view of all the circumstances involved, we are persuaded that the

[7] This provision (29 U.S.C. (1946 ed., Supp. I) 159(e)(1)), which was repealed in 1951 (Pub. L. 82–189, 65 Stat. 601), provided: "Upon the filing with the Board by a labor organization, which is the representative of employees as provided in Section 9(a), of a petition alleging that 30 per centum or more of the employees within a unit claimed to be appropriate for such purposes desire to authorize such labor organization to make an agreement with the employer of such employees requiring membership in such labor organization as a condition of employment in such unit, upon an appropriate showing thereof the Board shall, if no question of representation exists, take a secret ballot of such employees, and shall certify the results thereof to such labor organization and to the employer."

> headquarters of the employees provide the best criteria because they represent the focal points of the employment relationship. [Footnote omitted.] The headquarters are where the employees report to work, receive their instructions, and are paid their salaries. It is, therefore, in the States in which they have their headquarters that the provisions of any agreement between a union and an employer regarding the employees involved will be effectuated. In view of the fact that most of the essential matters with respect to the employment relationship will be dealt with in the States where the employees have their headquarters, we believe that application of this test to determine which State law shall control will result in the least amount of extra-territorial effect being given to the laws of one State as against those of another.

Accordingly, the Board directed that "all employees whose headquarters are located in States having legislation prohibiting union-shop agreements should be excluded from the unit hereinafter found appropriate" (*ibid.*).

In *Western Electric Co.,* 84 NLRB 1019, 1022, decided the next year, the Board held that the "job site, as that is where [the employees] report for work, receive their instructions, and are paid their wages", was the "headquarters" for the Company's field equipment workers. The Board rejected a contention that those employees, who worked in 45 states and were subject to frequent transfers, all should be subject to the laws of the State where their employer has its main

office (*id.* at 1023, n. 15). See also *Giant Food Shopping Center*, 77 NLRB 791.

In sum, the Board has concluded that a State does not have sufficient interest in a particular group of employees to warrant application of the State's union security laws to them unless the individual employees work, or have their "headquarters," within that State. This test is consonant with the purpose of Section 14(b), which was designed to respect a State's judgment about the extent to which *its workers* should be required to join or support a union as a condition of employment. See H.R. Rep. No. 245, 80th Cong., 1st Sess. 34, 44 (1947), 1 Legislative History of the Labor Management Relations Act, 1947 (G.P.O., 1948) ("Leg. Hist.") 292, 325, 335; H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 60 (1947), 1 Leg. Hist. 505, 564; Note, 88 Harv. L. Rev. 1620, 1627 (1975). The court of appeals, on the other hand, has afforded extra-territorial effect to Texas' judgment, necessarily denigrating the contrary judgment of New York and other States that have close contacts with individual seamen but which, like Texas, claim no seamen as members of the State's workforce.[8] As Judge Ainsworth pointed out in dissent (Pet. App. 30a, n. 21),

[8] Approximately 40 percent of the seamen sought employment at respondent's New York office. Even though the "final hiring decision" occurred in Texas, this was only a formality for seamen applying in New York; the Texas office set manpower requirements and kept personnel records, but Mobil's New York representatives chose the particular seamen (App. 88–91). Moreover, the seamen hired in New York can, and frequently do, ship out of other than Texas ports, and more than half of all the seamen list a State other than Texas as their residence.

"the majority opinion does not fully explain how Congress could fairly be said to have intended that a New York employee of Mobil, who resides in a state where his employment contract was entered into and where agency shop provisions are permissible, and who performs no work whatever in Texas, should be prohibited by Texas law from enjoying the benefits of an agency shop provision in his employment contract."

Under the Board's employee headquarters or jobsite criteria, the decision of the court of appeals is incorrect. The employees report to work on the ship in a variety of ports not limited to Texas; they receive their work instructions on the ship, and are paid their wages there. All work is performed aboard the ship, which most of the time is on the high seas. When the ship is in a Texas port, it is there for only a few hours; the seamen do not leave the ship unless the docking happens to coincide with their off-duty period.

The court of appeals sought to distinguish *Northland Greyhound* and *Western Electric* on the ground that the "issue raised in those cases * * * was not whether some state law applied to the employment relationship but *which* state law applied" (Pet. App. 5a, n. 5). But this distinction assumes that "some state *had* to meet the criteria of 14(b)" (Pet. App. 34a, n. 6, emphasis added). There is no reason why this must be so. If no State is the job situs of the workforce, then no State has sufficient interest in applying its policies, whatever they may be, with respect to union security clauses. Chief Judge Brown correctly observed in dissent (Pet. App. 33a–34a):

Section 8(a)(3) expressly sanctions as a matter of federal policy union shop agreements with the important limitation that such agreements will not be valid "as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law." While noting this "tension" between federal and state policy, the Court starts and finishes with the tacit assumption that the Court must find *some* applicable state law—almost in a conflicts-of-law analysis. The basis for that assumption is in no way discernible from the Act itself or its legislative history. Instead, the emphasis of the Act is that union security agreements are of such importance that absent state proscription outlawing union shop employment relationships within that state, they will be favored. The job situs rule, though never before applied in precisely this situation, is merely a logical distillation of § 14(b). [Footnote omitted.]

Because the location of the employees' jobsite is controlling for purposes of Section 14(b), and because the seamen here work on the high seas,[9] the Texas

[9] Petitioner finds support for its argument, as did the dissenting judges (Pet. App. 25a–27a), in the fact that seamen usually are governed by uniform and federal maritime law rather than by state laws. There is, however, no abstract bar to appropriate state regulation of the maritime industry. This Court has precluded state interference with maritime commerce only when pervasive federal regulation or the nature of the endeavor neces arily requires rules of uniform applicability. See *Askew* v. *American Waterways Operators, Inc.*, 411 U.S. 325, 337–344; *Kossick* v. *United Fruit Co.*, 365 U.S. 731, 738–739; *Huron Portland Cement Co.* v. *City of Detroit*, 362 U.S. 440, 444. Cf. *American Radio Association* v. *Mobile S.S. Association, Inc.*, 419 U.S. 215; *Windward Shipping* v. *American Radio Associa-*

right to work laws cannot properly be applied to them.[10]

3. The court of appeals correctly held, however, that it had jurisdiction of this case. The issues subsumed in the second question presented by the petition have been the subject of consideration by this Court on numerous occasions, and there is no need for it to consider them again here.

This Court held in *Smith* v. *Evening News Association,* 371 U.S. 195, 197–198, that federal courts have jurisdiction to determine the validity of a provision in a collective bargaining agreement even though the dispute may also involve an unfair labor practice within the Board's jurisdiction. Cf. *Connell Construction Co.* v. *Plumbers Local No. 100,* No. 73–1256, decided June 2, 1975, slip op. 9; *Retail Clerks* v. *Schermerhorn,* 375 U.S. 96, 102–105. The court of appeals

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tion, 415 U.S. 104. Section 14(b) expressly permits diversity of regulation concerning union security and contains no exemption for maritime workers (compare the Railway Labor Act, which contains such an exemption (45 U.S.C. 152 Eleventh), nor would maritime commerce be disrupted or hindered by the application to different ships or employers of different union security rules. We therefore conclude that the potential for nonuniformity of law governing maritime affairs is not an objection to the court of appeals' decision.

[10] One commentator has suggested that, since the hiring process takes place in both Texas and New York, and both States have a large number of affected employees as residents, the problem should be resolved by applying both Texas' and New York's union security laws to the Company's work force. Under this proposal, members of the same crew, subject to the same contract, would be governed by opposing union security rules. Note, 88 Harv. L. Rev. 1620, 1629–1630 (1975). This proposal, with its potential for disruption of labor-management relations, has no support in the statute or its legislative history.

therefore correctly held that the jurisdiction of the district court to determine the validity of the agency shop clause here was not preempted by whatever parallel authority may be lodged in the Board.

Chief Judge Brown suggested (Pet. App. 34a–36a) that the district court should have deferred to the primary jurisdiction of the Board. But such deferral would presuppose the availability of a Board procedure for resolution of the issue in question. *Local No. 189, Meatcutters* v. *Jewel Tea Co.*, 381 U.S. 676, 687–688. The Board has no generally available procedure for resolving questions of this sort. Although the parties could have sought an advisory opinion, such proceedings generally have been entertained by the Board only for determining whether the amount of commerce involved in a case would satisfy the Board's discretionary jurisdictional yardsticks. See, *e.g.*, *National Bulk Carriers, Inc.*, 134 NLRB 1186; *Jemcon Broadcasting Co.*, 135 NLRB 362, 367; *Connecticut State Board of Labor Relations and Hartford Building Maintenance Co.*, 145 NLRB 1415.

As the Court observed in *Jewel Tea, supra*, 381 U.S. at 687, a private litigant cannot ensure Board determination of an issue, for "[i]t is the function of the Board's General Counsel rather than the Board or a private litigant to determine whether an unfair labor practice complaint will ultimately issue." What is more, even should the General Counsel bring a case of this sort before the Board, it is far from clear that the Board could resolve the dispute, because maintenance of a union security clause alleged to violate state

law generally is not an unfair labor practice under the NLRA if the clause satisfies the requirements of Section 8(a)(3). See *Retail Clerks* v. *Schermerhorn*, supra, 375 U.S. at 102–103; *Local 34, Int'l Molders (Daniel Garczynski)*, 150 NLRB 913, 916–919; Quarterly Report of the General Counsel for the First Quarter of 1975, 89 LRRM 199–200; *United Steelworkers (Capitol Foundry Div.)*, 199 NLRB 153. The Board therefore does not possess primary jurisdiction in cases of this sort.

CONCLUSION

The petition for a writ of certiorari should be granted, limited to the first question presented.

Respectfully submitted.

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